84-991

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FILED
JUL 7 1984
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1984

FILOMENA McINTOSH,
Employee - Petitioner,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Employer - Respondent,

and

LIBERTY MUTUAL INSURANCE COMPANY,
Insurance Carrier - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILOMENA McINTOSH, Pro se
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(914 476 2329)

25 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether lack of diversity jurisdiction was a valid factor in depriving petitioner of her rights to a review of her Complaint in Federal Court?
(U.S.D.C., S.D.N.Y., 83 CIV 0809)

2. Whether petitioner's Appeal to the U.S. Court of Appeals for the Second Circuit was properly dismissed for "no cause of action"?
(83 CIV 7332)

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PETITION

The petitioner, Filomena McIntosh, respectfully prays that a writ of certiorari issue, to review the judgment of the United States Court of Appeals for the Second Circuit, entered on December 2, 1983.

OPINION BELOW

The Court of Appeals entered its Memorandum decision denying petitioner a right of action on the federal causes of action purported. Petitioner's state causes of action were also dismissed and affirmed the U. S. District court decision that diversity of citizenship was lacking.

The Court of Appeals denied petitioner's request for a rehearing on February 9, 1984 and second petition for rehearing on April 10, 1984.

JURISDICTION

Courts have the power and duty to exercise their own independent judgment. 2 AM J2d Adm L § 692. Page 582

CONSTITUTIONAL PROVISION INVOLVED

Title VI of the Civil Rights Act of 1964.

STATEMENT OF THE CASE

Petitioner, Filomena McIntosh, is a resident of Yonkers, New York. She was employed as a secretary by the respondent, International Business Machines Corporation in December 1965.

In June 1971, after IBM's new subsidiary IBM World Trade Corporation was formed and incorporated in the state of Delaware, the petitioner was transferred to that corporation.

In January 1977 she was transferred back to the parent New York corporation.[1]

In September 1977 a job-related back injury rendered her totally disabled. She was fired on January 30, 1980 as a non-disabled employee after IBM subjected her to

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[1]Subsidiaries of International Business Machines Corporation:
IBM World Trade Corporation
IBM World Trade Europe/Middle East/ Africa Corporation
IBM World Trade Americas/Far East Corporation
Science Research Associates, Inc.

a negligent company physician's rehabilitation scheme.

On September 30, 1981, 18 months after petitioner was fired, total disability determinations were made by the Workers' Compensation Board retroactively. (WCB 0777 1570).

Respondents, however, willfully and knowingly distorted her medical records to cause the WCB to periodically leave gaps in total disability awards without conclusive medical evidence.

Petitioner's plea to the WCB to correct her record and reconsider their reduced disability determinations was not granted.

Petitioner submitted her brief to the Appellate Division, Third Department April 1984, (46906).

Article 7, Workers' Compensation Law, was not complied with by the Board.

Petitioner filed for social security disability benefits in March 1980 and denied.

In December 1981 petitioner filed a suit against the Secretary of Health and Human Services protesting distortion of her medical records . On January 31, 1984 an Opinion and Order was handed down favoring the petitioner and reprimanding the lower court. (U.S.D.C., S.D.N.Y., CIV 81 6545).

While that suit was pending, petitioner filed a subsequent suit in the same court on January 28, 1983 against IBM, et al because of the medical distortions in her record which were generated to deny her disability benefits also out of which prima facia tort, breach of oral implied contract and abusive discharge resulted.

On March 30, 1983 the court dismissed her Complaint for lack of diversity jurisdiction. (U.S.D.C., S.D.N.Y., CIV 83 0809).

REASON FOR GRANTING WRIT

Petitioner filed two suits in federal court pertaining to the same subject matter. Because the first suit which was filed against the Secretary of Health and Human Services did not bring in IBM as a third party defendant, petitioner filed a subsequent suit against IBM. When she filed the second suit, the first one was still pending.

When the petitioner filed the second suit she asked the court to consider consultative jurisdiction to bring the two suits together because the Complaints were similar.

IBM is a corporation which receives federal grants and federal financial assistance through government contracts, and her causes of action were properly presented for review and consideration in federal court, especially since a disability

determination was made in the first suit in federal court.

Petitioner Contends that the Court of Appeals misclassified her causes of action as "alleged." Petitioner incorporated various exhibits to support the causes of action outlined in her brief.

Although petitioner named the New York based IBM in her Complaint, she had accrued longevity benefits from both the domestic and foreign IBM corporations of diverse citizenship.

CONCLUSION

Petitioner believes this case has presented an entirely new question of law for the courts to consider. It is a kind that cannot be decided by any existing precedent, such as an earlier case involving the same facts.

For this reason, Petitioner's plea for a Writ of Certiorari should be granted.

Note: The U.S. Court of Appeals was not able to produce petitioner's file for review after many repeated requests when this Writ for Certiorari was prepared and no explanation was given why the file was missing. In addition petitioner's request to review the transcript of the hearing held December 2, 1983, was not granted. (File No. 83-7332, Second Cirtuit).

Respectfully submitted,

Filomena McIntosh,. pro se
19 Valerie Drive
Yonkers, NY 10703
(914 476 2329)

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

FILOMENA McINTOSH,

Plaintiff,

-against-

ORDER
82 Civ.0809(ADS)

INTERNATIONAL BUSINESS MACHINES, INC., and, LIBERTY MUTUAL INSURANCE COMPANY,

Defendants.

- -

ABRAHAM D. SOFAER, D.J.:

Plaintiff's pro se complaint cannot be read, even with reference to her reply affidavit to allege facts that could establish jurisdiction. Diversity of citzenship is lacking, and the other acts cited by plaintiff have no pertinence to this case. Motion to dismiss granted. FRCP 12(b)(1).

SO ORDERED.

Dated: New York, New York
March 30, 1983

/s/
ABRAHAM D. SOFAER
U.S. DISTRICT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of December one thousand nine hundred and

Present:

Honorable Ralph K. Winter,

Honorable George C. Pratt,

Circuit Judges.

Honorable Charles M. Metzner,

District Judge.

FILOMENA McINTOSH

V.

INTERNATIONAL BUSINESS MACHINES, INC., and LIBERTY MUTUAL INSURANCE COMPANY

Docket No. 83-7332

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was taken on submission.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Filomena McIntosh appeals pro se from the dismissal of her complaint pursuant to Fed. R. Civ. P. 12(b)(1). Ms. McIntosh's complaint alleged various federal and state causes of action against defendant IBM, a New York corporation.

The federal causes of action purported to state claims under the Rehabilitation Act, 29 U.S.C. § 793(a) and under the Federal Insurance Contribution Act, 26 U.S.C. §§ 3101-3126. These claims were properly dismissed since neither act creates a private right of action. See, e.g. Davis v. United Air Lines, Inc. 662, F.2d 120 (2d Cir. 1981), cert. denied, 102 S.Ct. 2045 (1982). (Rehabilitation Act).

The state causes of action alleged (1) breach of an oral implied contract, (2) prima facie tort, (3) abusive discharge and violations of the New York State

Workmen's Compensation Law (N.Y. Work. Comp. §§ 1 et. seq. (McKinney). These claims were also properly dismissed since they raise matters of state law and there is no diversity of citzenship.

/s/
HONORABLE RALPH K. WINTER

/s/
HONORABLE GEORGE C. PRATT

/s/
HONORABLE CHARLES M. METZNER

APPENDIX C

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 9th day of February one thousand nine hundred and eighty-four.

FILOMENA McINTOSH,
Plaintiff-Appellant,

v. No. 83-7332

INTERNATIONAL BUSINESS ,ACHINES, INC. and LIBERTY MUTUAL INSURANCE CO.,

Defendants-Appellees.

A petition for a rehearing having been filed herein by plaintiff-appellant, Filomena McIntosh, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. Daniel Fusaro,
Clerk
/s/
by Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- -

Filomena McIntosh, Appellant,

-against-

International Business Machines Corporation

and

Liberty Mutual Insurance Company, Appellees

- -

83 CIV 7332

NOTICE OF MOTION

Second petition for rehearing

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

/s/
RALPH K. WINTER
Circuit Judge

April 18, 1984

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

FILOMENA McINTOSH,

Plaintiff,

-against-

SECRETARY OF HEALTH AND HUMAN SERVICES,

Defendant.

- -

OPINION AND ORDER
81 Civ. 6545 (RO)

APPEARANCES

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EXCERPTS

Page 2, paragraph 1:

OWEN, District Judge

This action is an appeal, pursuant to 42 U.S.C. § 405(g), of the final decision of the Secretary of Health and Human Services not to award disability benefits to claimant, Mrs. Filomena McIntosh. The sole issue to be resolved is whether the Secretary's decision was based on substantial evidence. I conclude that there was insufficient evidence upon which to have based a denial of benefits, and accordingly remand this case for further consideration of the relevant evidence...

Page 2, paragraph 2:

...In January, 1980, Mrs. McIntosh received notice of termination for failing to report to work. At the time she was fired claimant was eight and a half months short of

qualifying for early vested rights at age fifty-five. She has been unemployed since her dismissal....

Page 3, paragraph 3:

...Claimant has appealed pro se to this Court for a review of the Secretary's decision. This matter is now before me on cross-motions for judgment on the pleadings, pursuant to Fed.R.Civ.P.12(c)....

Page 4, paragraph 2:

...An examination of the instant record shows that the ALJ's three grounds for denial of Mrs. McIntosh's claim are not supported by substantial evidence and are in fact undermined by the administrative record....

Page 8, paragraph 2:

...The insubstantiality of the ALJ's grounds for denial is in stark contrast to the extensive and uncontroverted testimony, both medical and personal, regarding the

severity of claimant's condition. Mrs. McIntosh's case is much stronger than many which have been reversed or remanded for insubstantial evidence on which to base a denial. Subjective evidence of pain, along with medical evidence, has been held legally substantial even where there was other medical evidence based on actual examinations, contradicting the diagnoses of the treating physician and claimant's subjective contentions. See, Bastien v. Califano, supra; Gold v. Secretary of Health and Human Services, supra. In Mrs. McIntosh's case there was no contradictory evidence, medical or otherwise, to place claimant's avowals seriously in doubt...

Page 9:

...For the reasons set forward above, plaintiff's motion is granted and the proceeding is remanded to the Secretary

for the reconsideration of the evidence in accordance herewith.

So ordered.

/s/ R. Owen

United States District Judge

Dated: January 31, 1984

New York, N. Y.